Supreme Court, U.S.
FILED
JUN 8 1999
CLERK

No. 98-1921

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 92, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner,

v.

JAMES WILSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

EDWARD L. GILBERT
EDWARD L. GILBERT CO., LPA
7 W. Bowery Street
Suite 706
Akron, Oh 44308
(330) 376-8855

Counsel for Respondent

TABLE OF CONTENTS

A. JURISDICTIONAL GROUNDS 1

B. STATEMENT OF FACTS 2

C. STATEMENT OF THE CASE 3

1. It Would Be Improper for this Court to Revisit the Issue of Attorney Fees Because the Petitioner Failed to Make a Timely Objection to the Previous Ruling, And Certiorari Was Denied on this Case 3

D. GENERAL BACKGROUND 4

1. The District Court dismissed the hours devoted to pursuing claims against the dismissed defendants . 4

2. The District Court dismissed the hours devoted to pursuing the claims of the five dismissed plaintiffs 5

3. The District Court dismissed excessive hours, pursuant to Defendant's Brief in Opposition to Attorney Gilbert's fee application 5

4. The District Court dismissed excessive hours pursuant to Petitioner's challenges 5

5. The District Court reduced the costs claimed for fax and copy services 6

6. The District Court amended the Judgment Entry 6

E. ADDITIONAL REASONS AGAINST GRANTING THE WRIT 7

1. The Sixth Circuit Correctly Required the Union in this Hybrid 301 Case to Pay the Respondent's Attorney Feesincurred in Pursuing His Claims Adverse to the Union 7

2. The Sixth Circuit Properly Affirmed the Award of Attorney Fees and Costs Which Were Not Excessive with Respect to the Amount Actually Incurred by Respondent 8

F. CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page(s)**

Achilli v. John J. Nissen Baking Co., 989 F. 2d 561 (1st Cir. 1993) 7

Blades v. U.S., 407 F. 2d 1397 (9th Cir. 1969) 1

Hensley v. Eckerhart, 461 U.S. 424 (1983) 8, 10

James Wilson v. Local 92, Case No. 5:92 CV 2348 (1997) 4

Meches v. Reynold Metals Co., 604 F. Supp. 598 (N. Dist.D.C. Ala., 1985) 1

Parker v. Local 413, 501 F. Supp. 440 (S.D. Ohio 1980) 7

United States, Tittle and Coposition Roofers, Damp and Waterproofing Workers Assn. Local 307 v. G & M Roofing and Sheet Metal Co., 881 F. 2d 291 (6th Cir. 1989) 10

Wirtz v. Local Union 169, Intern. Hod Carriers, Bldg. & Common Laborers' Union of America, AFL-CIO, 245 F. Supp. 741 (U.S. Dost. Ct. Nevada, 1965) 2

Zuniga v. United Can Co., 812 F. 2d 443 (9th Cir. 1982) 10

(Table of Authorities continued)

Rules of the Supreme Court

Rule 13.1 1
Rule 13.3 1
Rule 33.1(d) 2
Rule 33.7 2

Statutes

42 U.S.C. § 1988 9

A. JURISDICTIONAL GROUNDS

1. The Respondent Objects to this Petition for Writ of Certiorari on the Grounds That the Petitioner Did Not File it in a Timely Manner, and Used Incorrect Format in the Petition

This Court does not have jurisdiction to hear this matter because of the untimely filing of the petition and the refusal of the petitioner to use the proper format. Pursuant to Rule 13 of the Rules of the Supreme Court, a petition for a writ of certiorari to the Supreme Court shall be deemed in time when it is *filed* with the Clerk within 90 days after the judgment entry. *See* Rules of the Supreme Court, Rule 13.1.

> "The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time." *See id.* at Rule 13.3.

In the present case, the petition for writ of certiorari was not received by this Court until May 28, 1999, 91 days following the Sixth Circuit's denial of the petition for rehearing en banc. The Respondent respectfully requests that this Court take note that the petition has a filing date of May 27, 1999 only because the petition was postmarked on that date.

> "To 'file' a paper requires its *delivery* to the proper office." *Meckes v. Reynold Metals Co.*, 604 F.Supp. 598, 601 (N.Dist.D.C. Ala., 1985).

> "A document has not been 'filed' with or 'returned' . . . until it has been actually received . . . and mere mailing is not enough." *Blades v. U.S.*, 407 F.2d 1397, 1399 (9th Cir. 1969).

> "A document is not usually 'filed' when it is deposited in mails . . . " *Wirtz v. Local Union 169, Intern. Hod Carriers, Bldg. & Common Laborers' Union of America, AFL-CIO,* 245 F.Supp. 741, 750 (U.S.Dist.Ct. Nevada, 1965).

Due to the Petitioner's refusal to follow the rules of this Court, the petition was not received in a timely manner, and it is improper for the Court clerk to view it as having been filed within the 90 day time limit.

Further, the inaccuracies in the content and style of the submitted materials also violate the rules of this Court. Pursuant to Rule 33.1 (d) of the Rules of the Supreme Court, every document must be produced on opaque, unglazed paper 6 1/8 by 9 1/4 inches in size, with type matter approximately 4 1/8 inches and margins of at least three-fourths of an inch on all sides. The added "appendix" portion of the petition uses 8 1/2 by 11 inch paper folded inside the binding of the petition at pages 16a-26a.

Rule 33.7 of the Rules of the Supreme Court states,

> "The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule . . ."

The Respondent respectfully submits that this Court should weigh these additional factors as evidence that this petition for writ of certiorari should not be granted.

B. STATEMENT OF FACTS

The Respondent concurs with the general Statement of Facts as stated by the Petitioner on page 3 of the Petition for Writ of Certiorari, with the exception of footnote 1 on page 3.

C. STATEMENT OF THE CASE

1. It Would Be Improper for this Court to Revisit the Issue of Attorney Fees Because the Petitioner Failed to Make a Timely Objection to the Previous Ruling, and Certiorari Was Already Denied on this Case.

In it's April 28, 1997 opinion, on remand from the Court of Appeals, the District Court filed a memorandum on the issue of attorney fees owed to Respondent and his counsel in this case, and gave the parties leave until May 16, 1997 to request an evidentiary hearing. *See* Docket No. 485. The Court did not receive a request for an evidentiary hearing from either party by this deadline, and subsequently awarded judgment to Respondent Wilson and his counsel, Edward Gilbert, in the sum of $106,656.22. *See id.*

After the expiration of this deadline, Petitioner subsequently filed a motion seeking relief from judgment, which the Trial Court denied for untimeliness in it's memorandum and order dated May 29, 1997. The Court deducted the sum of $2,168.82 in costs, however, finding this amount to be related to Respondent's failed action against dismissed defendants, thereby entering judgment in favor of the Respondent and his counsel in the sum of $104,487.40. See id.

The Petitioner filed a timely appeal on the issue of attorney fees following the District Court's ruling for Respondent Wilson and his counsel. On December 22, 1998, the Sixth Circuit Court of Appeals affirmed the ruling of the District Court.

On December 30, 1998, the Petitioner requested reconsideration and clarification of the Appellate Court's ruling.

On January 12, 1999, the Appellate Court issued another order and clarified their previous order, affirming the decision of the District Court.

The Petitioner submitted a petition to the Court of Appeals for a rehearing en banc, which was denied on February 26, 1999. *See* Docket No. 97-3668/97-3672. The Court of Appeals stated that the panel reviewed the petition for rehearing and concluded that the issues raised in the petition had been fully considered upon the original submission and decision of the case. *See id.*

D. GENERAL BACKGROUND

In it's April 28, 1997 and May 29, 1997 rulings, the District Court addressed Petitioner's objections to Respondent's counsel's application for attorney's fees. *See James Wilson v. Local 92*, Case No. 5:92 CV 2348 (1997). The Court took great care to review the petition and reduced the amount originally requested by the Respondent by 58.5% (resulting in a reduction of $146,768.86) by reviewing the following categories:

1. The District Court dismissed the hours devoted to pursuing claims against the dismissed defendants.

From it's grant of Summary Judgement to the International Brotherhood of Teamsters and Local Union 507 (June 14, 1993), the Court found that the contentions of the Respondent represented claims separate from those raised against Local 92 and reduced Attorney Gilbert's fees accordingly. The Court found 85.75 hours claimed by Gilbert and 20.91 hours claimed by the legal researcher related

exclusively to the dismissed defendants. The Court also deducted another 20 hours from Gilbert, as some of the time claimed was viewed as being "general in nature."

2. The District Court dismissed the hours devoted to pursuing the claims of the five dismissed plaintiffs.

The District Court deducted 10 hours for work Gilbert did in support of the dismissed claims of the five plaintiffs, as well as 8.25 hours which were readily identified as applying to the five plaintiff's, as a result of the June 14, 1993 ruling of summary judgment against the five plaintiffs.

3. The District Court dismissed excessive hours, pursuant to Defendant's Brief in Opposition to Attorney Gilbert's fee application.

The District Court dismissed 6 hours as excessive charges. Specifically, the Court deducted 3 hours from the time claimed as preparation for plaintiff's status report, 1.85 hours from preparing the fee application, and 1.15 hours from review of orders and notices.

Continued in their April 28, 1997 decision, the District Court reduced the following hours claimed by Attorney Gilbert post verdict and through appeal, pursuant to Petitioner's challenge:

4. The District Court dismissed excessive hours pursuant to Petitioner's challenges.

The District Court reduced the hours which were charged to the Petitioner by 18.25 hours for out-of-court work and one hour for in-court work. The Court also found that 3.00 hours that were charged to the mediation process should not be chargeable to Local 92. Additionally, the Court deducted 5 hours as excessive. Finally, the Court considered that the appeal included the claims of the five plaintiffs which were

lost when the court granted the defendants summary judgment. The Court reduced the time devoted to the appeal by Gilbert and the outside legal research entity by a factor of 25%. The Court reduced the hours of outside research by 26.45 hours and Gilbert's hours by 9.375 hours. Also, the Court reduced Gilbert's out-of-court work hours by 35.625 hours and Gilbert's out-of-court law clerk's hours by 26.45 hours.

In their May 2, 1997 ruling the District Court ruled on the following costs allowable to the Respondent.

5. The District Court reduced the costs claimed for fax and copy services.

The Court reduced the costs claimed in the first application for faxes by $2532.00 and reduced the request for copying costs by $774.40. The Court also subtracted $16.00 from the costs claimed for faxes and $177.90 for the copying costs in the second application. An additional $197.15 for the cost of providing copies of the Sixth Circuit ruling to Respondent's expert was also subtracted.

6. The District Court amended the Judgment Entry.

In it's June 17, 1997 Amended Judgment Entry, the District Court reduced the original judgment by $2,168.82, pursuant to Local 92's contention that this sum related to Respondent's failed action against the dismissed defendants.

As noted above, Respondent's counsel received only 58.5% of the originally requested costs and Attorneys Fees, resulting in a reduction of $146,768.86 from the originally requested amount. The District Court's careful scrutiny of every hour charged to Wilson's case is indicative of the fact that this Petition for Writ of Certiorari is unwarranted, as the issues have already been carefully considered by both the

United States District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals.

E. ADDITIONAL REASONS AGAINST GRANTING THE WRIT

1. The Sixth Circuit Correctly Required the Union in this Hybrid 301 Case to Pay the Respondent's Attorney Fees Incurred in Pursuing His Claims Adverse to the Union

The Sixth Circuit ordered, upholding the District Court's decision, that the Union should be required to pay the Respondent's attorneys fees incurred in (1) the claims against the employer defendants and (2) the claims against the Union. The Petitioner argues that the Sixth Circuit decision is contra to prior rulings and unsupported by any statutory authority, case law or policy reasoning. This is not so.

It is within the sound discretion of the District Court to apportion all attorneys fees against the Union as consequential damages in a sec. 301 action. *See e.g. Parker v. Local 413,* 501 F. Supp. 440, 450-51 (S.D. Ohio 1980); *Achilli v. John J. Nissen Baking Co.*, 989 F.2d 561, 565-66 (1st Cir. 1993) (apportionment of attorneys fees "primary for the court to make."). Furthermore, A prevailing plaintiff is entitled to recover the following as consequential damages against his Union under sec. 301: the reasonable attorneys fees "he would not have incurred but for the Union's breach of duty to represent him fairly and in good faith. In other words, the plaintiff should be allowed to recover attorneys fees which would not have existed had the Union not failed in its duty to represent him. This "but for" test is easily met since "the Union...made this [entire sec. 301 hybrid] litigation unavoidable by turning a virtually deaf ear to the plaintiff." *See Parker* at 450-51. Hence an award including attorneys

fees and expenses incurred in the respondent's claims against the Union itself does not raise different issues.

Because the fees attributable to both the employer and the Union were too "intertwined" to distinguish between, the Sixth Circuit correctly affirmed the District Court's exercise of discretion against attempting to do so. Petitioner is attempting to argue that the "intertwined" doctrine does not apply due to an absence of outright collusion between the employer and the Union. However, the Petitioner has failed to recognize that "intertwined" is not limited to cases of collusion. Specifically, this Court has held that intertwined means that the legal effort was "devoted generally to the litigation as a whole," and that the legal effort relating to the claims against the Union contributed to the "'ultimate result'" of the plaintiff's hybrid action against the Union and employer both. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). The standard set by this court in *Hensley* is easily met. The legal effort expended is devoted to the entire general litigation. The award including attorneys fees and expenses incurred in the respondent's claim against the Union is part and parcel of the whole claim. By ignoring the concerns of the respondent, the petitioner made the entire sec. 301 claim possible. Accordingly, the Sixth Circuit decision, upholding the award of attorneys fees against the Union itself, is correct. Furthermore, the Sixth Circuit rightly recognized and upheld the discretionary power of the District Court to apportion the attorneys fees against the Union as consequential damages. Also, the claims against the employers and the Union were so intertwined that any attempt to separate the fees among the two parties would be highly inappropriate.

2. The Sixth Circuit Properly Affirmed the Award of Attorneys Fees and Costs Which Were Not Excessive with Respect to the Amount Actually Incurred by Respondent

The petitioner requests that the reasonable market rate does not govern and that fees be confined to amounts expended under the fee agreement rate. In support of the above the petitioner asserts that the actual award of $104,487.40 to be too much in excess of Respondent Wilson's actual payments to counsel of $15,758.86, that the civil rights law of attorneys fees is inappropriate, and that the award failed to reduce the amounts paid by the other five unsuccessful plaintiffs.

The agreement between the plaintiffs and attorney Gilbert was unique. The agreement provided that initially, Gilbert would be paid only $75-85 per hour. If the plaintiff was then successful in the litigation, Gilbert would then petition the court for fees at $250 per hour, and then reimburse plaintiff for fees paid. See R. 485, p.4. This unusual arrangement was to allow the plaintiffs to pursue their claim against the defendants despite their limited resource of funds while procuring a means for counsel to receive adequate and reasonable compensation for his services rendered. The Sixth Circuit upheld the fees award of $104,487.40 and the review of fee awards from the past so as to ascertain that a reasonable prevailing rate would be $125 per hour for out of court time and $175 per hour in court time. The above mentioned rate exactly corresponds to Gilbert's reasonable and customary fees.

Under 42 U.S.C. sec. 1988, a prevailing plaintiff is entitled to reasonable attorneys fees. Reasonable fees are what the District Court determines, in its discretion, reasonable market rates to be. The Supreme Court has explicitly held that

Civil Rights law should serve as a model for District Courts to use when fashioning attorneys fee awards in areas beyond civil rights-- for example, labor. *See Hensley* at 433, footnote 7 (1983), as construed by the Sixth Circuit Court of Appeals in the *United States, Tittle and Composition Roofers, Damp and Waterproofing Workers Assn. Local 307 v. G&M Roofing and Sheet Metal Co.*, 881 F.2d 291 (6th Cir. 1989) (Hensley governs attorneys fees under sec. 301). Hence, the use of civil rights attorneys fee law as a guide was well within the discretion of the lower courts. Furthermore, the Petitioner's claim that the courts below should have reduced the amount of fees by any amounts paid by the other five unsuccessful plaintiffs is a weak argument. The lower court did in fact implement such a reduction. Among the vast areas of reduction enumerated in this brief's statement of facts, the fees awarded do reflect a 25% reduction consisting of work done for the other plaintiffs not benefitting Wilson. R. 485 p. 12-13. However, the District Court also reasoned that to limit the award to dollars actually spent would result in a windfall to Local 92. Furthermore the Court stated that the fact that a number of plaintiffs shared in the duty of paying the attorney should not reduce the Union's liability to pay attorneys fees reasonably incurred. R.485 p.5. It was for the District Court to determine, in the sound exercise of its discretion, whether or not to reduce fees to the amount paid to Gilbert by Wilson alone. *See e.g. Zuniga v. United Can Co.*, 812 F.2d 443, 454 (9th Cir.1982).

A determination of attorneys fees is within the sound discretion of the District Court and will not be disturbed absent an abuse of discretion. *See id* at 454. As shown in the discussion above, neither the District Court in issuing nor the Court of Appeals in upholding the award abused their discretionary powers necessitating any disturbance. The respondent respectfully urges this court to uphold the decision

of the court below which properly calculated and awarded fees and costs rightfully due to the respondent.

F. CONCLUSION

This Court does not have jurisdiction to hear this matter because of the untimely filing of this petition and the Petitioner's refusal to follow the proper format in submitting the petition. Even if jurisdiction were granted, it would be improper for this Court to revisit the issue of attorney fees because the petitioner failed to make a timely objection to the previous ruling, and certiorari has been denied in this case. The District Court made a careful inspection of the costs and fees awarded to Respondent and his counsel, and made dramatic reductions upon its inspection. The Sixth Circuit correctly required the Petitioner in this hybrid 301 case to pay the Respondent's attorney fees incurred in pursuing his claims adverse to the Union. The Sixth Circuit was proper in affirming the award of attorney fees and costs because they were not excessive with respect to the amount actually incurred by the Respondent.

For the foregoing reasons, Respondent, James Wilson, respectfully prays that this court deny the petitioner's application for a writ of certiorari.

Respectfully Submitted,

EDWARD L. GILBERT
EDWARD L. GILBERT CO., LPA
7 W. Bowery Street
Suite 706
Akron, Oh 44308
(330) 376-8855

Counsel for Respondent